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In The

Supreme Court of the United States

October Term, 1973

No. 73-513

EDGARDO TORRALVO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

Supreme Court of the United States

October Term, 1973

No.

EDGARDO TORRALVO,

Petitioner,

-vs.-

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner, Edward Torralvo, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, entered in these proceedings on August 13, 1973, which affirmed the judgment of conviction against the petitioner.

OPINIONS BELOW

The petitioner was found guilty of the conspiracy charged in Count Six of the indictment, namely that he conspired with Contreras to furnish fraudulent documents which would enable Leppe and his common-law wife Pricilia Montes to falsely represent that they were citizens of the United States, in violation of Title 18, U.S.C. Sec. 911.

Said conviction was based on a jury verdict reported to Judge Irving Ben Cooper in the United States District Court for the Southern District of New York on December 20, 1972, and recorded at page 827 of the trial minutes.

On January 12, 1973, the petitioner moved in the District Court for a judgment of acquittal notwithstanding the verdict. Said motion was denied. The Court's statement is recorded at pp. 839-841 of the trial minutes.

On August 13, 1973, the Court of Appeals unanimously voted to affirm the judgment of conviction from the bench, without opinion. The order of affirmance is annexed hereto as Appendix A.

JURISDICTION

By further order dated August 28, 1973, the Court of Appeals denied Torralvo's petition for a rehearing. A copy of said order is annexed hereto as Appendix B. This petition for certiorari has been filed less than thirty days from the date aforesaid. Jurisdiction of this Court is invoked under Title 28 U.S.C.A. Sec. 1254 subd. (1).

QUESTIONS PRESENTED FOR REVIEW

1. Was the petitioner denied a fair trial, in violation of due process of law, when the United States Attorney delivered a threat to Contreras, the co-defendant, before he took the stand to give exculpatory evidence, that if his trial testimony contradicted his Grand Jury testimony, Contreras would be indicted for perjury?

2. Did said threat constitute suppression of evidence, and did it have the legal effect of sealing the lips of Contreras by forcing him to invoke the Fifth Amendment in respect of questions whose answers would have established the petitioner's defense?

3. Did the Trial Court commit error in admitting evidence of unrelated crimes, performed by Contreras alone, and in which the petitioner did not participate? Was additional error committed in the Court's charge with respect to said incompetent evidence?

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant portion of Amendment 5 provides: "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ".

The relevant portion of Amendment 6 provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ".

STATEMENT OF THE CASE

The indictment consisted of nine counts relating to false citizenship documents. Counts Seven and Eight charged the petitioner with substantive violations; but they were dismissed. Only Count Six, charging conspiracy, involved the petitioner.

Statement of the Case

The remaining counts related to Contreras alone. Prior to the trial of the petitioner, Contreras pleaded guilty to the substantive crime charged in Count One, to the conspiracy charged in Count Five, and to the perjury charged in Count Nine.

Proof of the Conspiracy (Count Six):

Leppe, an alien from Guatemala, desired to regularize his unlawful status in this country. He responded to a newspaper advertisement inserted by a Spanish attorney, Dr. Zequeira, whose address was the same as that of the petitioner's travel agency, located on 14th Street, in Manhattan. When Leppe appeared at said address, he did not meet Zequeira, but allegedly was taken care of by the petitioner. Torralvo denied that he had conducted any dealings with Leppe, and contended that Zequeira had handled the transaction.

As evidence of mistaken identity, Torralvo's secretary testified that Zequeira occupied the mezzanine of Torralvo's office. Contreras testified that Zequeira and Torralvo were of about the same height and build. Torralvo's secretary further testified that on one occasion Leppe came into the store looking for Torralvo. When told that Torralvo was out of the country, Leppe insisted that he had spoken with him on the previous day. He then proceeded to describe Torralvo, but his description matched Contreras.

Leppe testified that in the initial conference in August, 1970, Torralvo offered to procure Labor Department permission for Leppe to remain in the country, for a fee of $600, one-half to be paid in advance. When Torralvo received the $300 deposit, he acknowledged same on a printed receipt of Torralvo Enterprises, Inc. Torralvo did

not deny executing said receipt; but he claimed that he did so upon the request of Zequeira who was handling the transaction, in order to accommodate Zequeira.

Months later, when the Labor Department documents were not forthcoming, Leppe came to the Travel Agency in February, 1971. Torralvo then took him up to the mezzanine; told him that it was very difficult to obtain residence papers; and offered to furnish him with three documents which would evidence American citizenship; a Puerto Rican birth certificate, a Selective Service card, and a Board of Elections Identification Card. The cost would be the balance of $300. Several days later, on the mezzanine, Torralvo allegedly delivered said documents to Leppe.

Leppe was interested in procuring similar documents for his common-law wife Lopes; and Torralvo replied: "any time, just give me a call." When Leppe called for that purpose, Torralvo told him he was about to leave the country and that Contreras would take care of his wife's papers. Subsequently, Contreras met Leppe outside of the office; took him to the second floor of said building; and discussed the Lopes' documents with him in the office of an attorney named Garcia. The fee was fixed at $500.

When Leppe came to the store several days later, Contreras took him away in a car and delivered the Montes documents, consisting of a Puerto Rican birth certificate, a Board of Elections Identification Card, and a baptismal certificate purportedly issued by St. Luke's Church in the Bronx.

In March, 1971, Leppe purchased airline tickets for himself and Lopes in petitioner's travel agency. They visited Guatemala and El Salvador. On their return via Miami, they were detained by the immigration authorities

on April 14, 1971. Leppe then made an affidavit naming Torralvo and Contreras as the parties who had furnished the fraudulent documents.

The Business Relationship Between Petitioner and Contreras:

Their relationship commenced in 1968. Contreras then operated an immigration consulting service located in Brooklyn, and he required a Manhattan address. Their respective attorneys prepared an agreement under which Contreras would use Torralvo's address in his advertisements; Torralvo would collect from the client the entire fee, which he would deposit in the account of Contreras' company; and Torralvo would receive for such referrals a commission amounting to one-third of the fee.

In December, 1969, Contreras was sent to prison for a crime against the State of New York. Since Torralvo had collected fees for services which Contreras was unable to complete, Torralvo was obliged to refund large sums of money. When Contreras was released he promised to reimburse petitioner for said refunds and also to complete the outstanding cases. For that purpose, Torralvo rented him the mezzanine space in his office.

Said space had previously been occupied by Zequeira. After Contreras moved in, there were occasions when both of them were together in the mezzanine space.

Contreras testified that he was not a partner in Torralvo's business, nor was Torralvo a partner in his business. Indeed, Torralvo never made use of the mezzanine.

Petitioner's Attempt to Procure Exculpatory Testimony from Contreras:

Torralvo testified that he was questioned by the Grand Jury about many things which he knew nothing about. He visited Contreras in prison and was told that Torralvo had played no part in the Leppe transaction; indeed Leppe was the client of Zequeira.

In order to establish said defense, petitioner vitally required the testimony of Contreras. Contreras was represented by an attorney, Jacobs, who could not permit Contreras to incriminate himself by giving testimony in respect of Count Six, which was still open as against Contreras.

Contreras having already pleaded guilty on three counts, Judge Cooper suggested that the government should drop the outstanding counts against Contreras so that he could testify on behalf of Torralvo. Attorney Jacobs stated that Contreras could freely testify, but whether he would invoke the Fifth Amendment would depend on the specific questions.

The following day, attorney Jacobs stated that since some questions might bring out the fact that Contreras had testified falsely before the Grand Jury, he would have to invoke the Fifth in certain areas. The United States Attorney then offered to move to dismiss Count Six. Having cleared the field for Contreras to testify freely, the United States Attorney nevertheless sealed his lips on the vital issues in the defense by warning that if Contreras made any statement which disclosed that he had committed perjury before the Grant Jury, he would be prosecuted therefor.

The trial judge found nothing objectionable in that warning. Indeed, the Court agreed that if Contreras committed perjury, the government would have to prosecute. The trial judge manifestly did not apprehend the thrust of the prosecutor's warning. He threatened

prosecution not for a perjury which might be committed in the course of Contreras' trial testimony, but for giving truthful testimony which would contradict Contreras' prior Grand Jury testimony. The record does not disclose what Contreras had testified to in respect of the Leppe transaction. In arguing the appeal, the United States Attorney stated to the Court of Appeals that in testifying before the Grand Jury, Contreras denied that he knew Leppe.

The prosecutor was entirely aware of such denial at the time he prepared the nine-count indictment. He included no perjury charge based on said denial, even though the evidence in support of Count Six necessarily established perjury in that regard. Before Contreras took the stand, the United States Attorney agreed to dismiss Count Six as against Contreras. The Record discloses the following (Minutes, p.427; A.95):

> "MR GORDON (Assistant United States Attorney):
>
> In addition to that, if Mr. Contreras makes any statement on the witness stand which is in itself perjurious, or which discloses that he committed perjury before the Grand Jury, the government will prosecute him for that. If he discloses evidence of any offense which is not subject of this indictment on the witness stand, the government will prosecute him for that.
>
> He is not getting an immunity bath because count 6 has been dismissed. I am sure that is perfectly clear, but I don't want any recriminations afterward.

THE COURT: It is overwhelmingly clear. It was at the Court's suggestion yesterday that I asked that the government give consideration to dropping the sixth count against Contreras so that the request of Torralvo could be honored.

In other words, the defendant wanted to have Contreras as a witness and it occurred to me that since he would rely on the Fifth there would be no testimony available to Torralvo from Contreras. And as the record will show the government immediately responded in the affirmative and has repeated it right now at this present robing room conference with Mr. Jacobs representing Contreras here and Mr. Edelman representing Torralvo here.

* * *

The sole purpose was to remove from Contreras his concern with regard to answering questions insofar as the outstanding count is concerned. It goes without saying that if he takes the stand and commits perjury that it would be the bounden duty of the government to proceed accordingly. Or, if he resorts to any trickery, a motion made to dismiss the sixth count would be reconsidered and we would set aside an order dismissing the sixth count.

We know that such trickery would not have been with Mr. Jacobs' connivance, but I mean, if Contreras wants to go off on his own, so to speak, and do something that is clearly a violation of what induced the dropping of the sixth count, why, certainly we are not going to be idle about it. We will do something affirmative."

As to whether he gets a clean bill of health regardless of what he says on the stand, of course, he doesn't. He is like any other witness.

All we are doing here now is making it possible for him to take the stand, and if he sees fit avoid assertion of the Fifth Amendment with respect to the sixth count, that is all we are doing.

From here on he is on his own. It is as clear as that. Isn't that so, Mr. Jacobs?"

When Contreras took the stand, he declined to answer the following questions on the ground that the answers might incriminate him:

1. "Did you ever meet a man by the name of Rudolfo Leppe?" (A.102)

2. "Did you ever, sir, have any business relationship with Mr. Zequeira which involved a Pricilia Montes?" (A.102)

3. "Do you know if Mr. Torralvo ever knew or spoke to a Mr. Leppe?" (A.104)

4. "Did you ever agree with Mr. Torralvo to perfect papers for a Mr. Leppe or a Miss Pricila Montes?" (A.107)

5. "Did you and Mr. Torralvo have any business arrangement of any kind with respect to Leppe?" (A.111)

6. "Did you discuss with Torralvo the facts pertaining to Count Six of the indictment?" (A.112)

Statement of the Case

After Torralvo was convicted, his attorney made a formal motion for acquittal notwithstanding the verdict, on the grounds that the government had in essence denied Torralvo the right to elicit exculpatory testimony from Contreras. Moreover, the government did so for the purpose of suppressing evidence that would be helpful to establish Torralvo's defense. Said motion was denied by Judge Cooper.

The Improper Admission into Evidence of Crimes not Charged in Count Six, and in which Torralvo Did Not Participate.

Since the government had elaborately prepared its case against Contreras, it proceeded to prove same, even though Contreras was not a defendant on trial, having already pleaded guilty. Over the constant and continuing objection of Torralvo's counsel, evidence was received to prove the unlawful application which Contreras made for his own passport (Count One); the fictitious baptismal certificate which Contreras procured for himself (Count Two); the application for Angulo's passport which was supported by a false affidavit of Contreras (Counts Three and Four); and the conspiracy by Contreras, Aparico, and Maria Curto to procure from Contreras a false birth certificate for Curto (Count Five).

Count Five of the indictment charges that the conspiracy involving Curto commenced on May 1, 1971. But clearly the conspiracy alleged in Count Six of the indictment had already terminated, because on April 14, 1971, Leppe was detained by the immigration authorities in Miami and he provided them with an affidavit on said date which inculpated both Contreras and Torralvo.

Father Ryan of St. Luke's Church testified that there was no record of a baptismal certificate issued to Priscila Montes (Count Six); nor to Contreras; nor to Angulo; nor to Aparicio, the brother-in-law of Curto. Count Five of the indictment makes no charge that illegal documents were furnished to Aparicio. Torralvo is not charged with delivery of any baptismal certificate.

The United States Attorney justified the admission of said irrelevant and prejudicial evidence on the theory that it was proper evidence to establish that Contreras was the source of the documents given to Leppe and Montes. The government, he contended, has the right to show that a co-conspirator had the wherewithal and the opportunity to do what he is charged with having done.

The government contended further that such evidence, which did not involve Torralvo, was admissable to establish that the travel agency was a place where aliens could get documents. The evidence was admissable because it established the source of the documents. The Court advanced a further ground for its admissibility, namely, that the conspirators were charged with acting together and it was part of their plan to furnish false documents.

In his charge to the jury, the trial judge instructed that the evidence as to Curto and Angulo was not binding on Torralvo. Nevertheless the law permits it to be admitted. Such evidence may be considered as corroborative of the testimony of Leppe, or of establishing opportunity, or preparation to assist the specific crime charged in the indictment.

REASONS FOR GRANTING THE WRIT

The threat of indictment, made to the witness by the United States Attorney, effectively sealed the lips of Contreras and denied to the petitioner his constitutional right to elicit exculpatory evidence to establish his defense. In *Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351, 34 L.Ed.2d 330, this Court recently condemned conduct on the part of a trial judge which had the effect of driving the witness off the stand. Similar conduct on the part of a prosecutor is equally a denial of due process. In *Webb*, the warning administered by the Court was that the witness would receive additional punishment if he committed perjury on the stand. In the instant case, the duress consisted in the threat that the witness would be indicted if he told the truth, if such testimony contradicted his prior Grand Jury testimony. Such warning was administered in spite of the fact that the Sixth Count had been dismissed as against Contreras and no charge of perjury had been made against him predicated on his Grand Jury testimony with respect to the Leppe transaction.

In the course of the argument of the appeal, the judges of the Second Circuit stated that they were relying upon their recent decision in *United States v. Sclafani and Ross*, (2nd Cir., June 27, 1973). Petition for certiorari is being filed in said case. It was contended in *Sclafani* that the trial judge had made threatening statements to a prospective witness which caused the attorneys for the defendants to refrain from calling him as a witness. In the *Sclafani* decision the Second Circuit pointed to a particular statement by the trial judge that the witness could not invoke the Fifth because no count had been left open in the indictment which charged the witness and the defendants on trial with extortion and loansharking.

But in the instant case, where no count was left open against Contreras, the trial judge nevertheless encouraged him to invoke the Fifth. Such conduct was in violation of the principle set forth by the Second Circuit in *United States v. Sanchez*, (2nd Cir. 1972) 459 F.2d 100, as follows:

Reasons for Granting the Writ

> "A defendant is entitled to every assistance which the court can give in compelling the attendance of witnesses and requiring them to give evidence, short of violating any rights they may properly claim under the Fifth Amendment. If a witness has already pleaded guilty to an offense he may no longer claim the privilege as to that offense".

The position taken by the United States Attorney and by the trial court in the instant case was also out of harmony with the recent decision of this Court in *Chambers v. State of Mississippi*, 93 S. Ct. 1038, 1045, which set aside a state court conviction because the trial judge had impeded the right of the defendant to produce exculpatory evidence by impeaching a witness whom he had called to establish his defense.

In *Hanger v. United States*, (8th Cir. 1968) 398 F.2d 91, cert. den. 393 U.S. 1119, the Court of Appeals ruled in favor of the government where the trial court impeded the prosecution from rehabilitating a government witness by offering a statement which was consistent with his trial testimony. The Court stated (page 105):

> "In addition, we think that in a situation where a key witness admittedly changes his story or his recital of important relevant events and admits that his former statements in regard to the proceedings in question were a fabrication, that he should be allowed to not only testify as to what he now swears is a true recital of the events, but to also testify as to the reasons for his fabrication and the reason why he decided to change his story; and all of the incidents and factors that shed light upon his credibility, both pro and con, are admitted, subject to the Court's discretion, and left to the

> jury for its evaluation and determination. * * * It is not a swearing match as to what was said but presents the crucial issue of which statements constitute a correct recital of the events under consideration".

The cutting off of such pursuit of the truth, by silencing a witness who was prepared to exculpate the petitioner, constituted suppression of evidence by the United States Attorney. Such conduct was in violation of the principles established by this Court in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194; *Mooney v. Holohan*, 294 U.S. 103, 112; *Pyle v. Kansas*, 517 U.S. 215; and *Berger v. United States*, 295 U.S. 78, 88.

The trial court committed additional error by admitting into evidence proof of crimes not charged in Count Six, which had been committed only by Contreras, and in which the petitioner did not participate. The jury was instructed that while such evidence was not binding on Torralvo, it could nevertheless be considered as corroboration of the testimony of Leppe, or as establishing opportunity, or preparation to commit the specific crimes charged in the indictment (A.145-147).

In no circumstances could said instruction apply to the unrelated conspiracy charged in Count Five, which charged Contreras, Aparicio and Curto with having provided a fraudulent birth certificate to Curto. Said conspiracy was not formed until after the conspiracy charged in Count Six had terminated. Moreover, the admitted proof under Count Five went beyond the crime charged therein. Evidence was received that a false baptismal certificate had been issued to Aparicio, with no evidence that Contreras had delivered it.

Reasons for Granting the Writ

The conspiracy charged in Count Six had terminated before the conspiracy charged in Count Five was formed, namely when Leppe made an affidavit to the immigration authorities on April 14,1971. *(Fiswick v. United States*, 329 U.S. 211, 67 S.Ct. 224, 227; *Lutwak v. United States*, 344 U.S. 604, 73 S.Ct. 481; *Logan v. United States*, 144 U.S. 19, 12 S.Ct. 614, 632).

Evidence of unrelated crimes, in which Torralvo did not participate, would be inadmissible under the ruling laid down in *United States v. De Sapio*, (2nd Cir. 1970) 435 F.2d 272. Nor would such evidence become admissible under the doctrine discussed in *United States v. Ravich*, (2nd Cir. 1970) 421 F.2d 1196. Said decision approved the introduction of unrelated crimes to establish opportunity or preparation, in order to prove the identity of the robbers. It also reaffirmed the basic proposition that a prosecutor may not introduce evidence of criminal character, or of the commission of a crime on one occasion, to prove the commission of a separate crime on another. It also warned that such unrelated evidence is to be excluded if its probative value is outweighed by its tendency to confuse the issues or influence the jury. (See also *United States v. Knohl*, (2nd Cir. 1967) 379 F.2d 427, 438; *United States v. Bosve*, (2nd Cir. 1966) 360 F.2d 1; *United States v. Johnson*, (2nd Cir. 1967) 382 F.2d 280; *Hamilton v. United States*, (5th Cir. 1969) 409 F.2d 928; *Bradley v. United States*, (D.C. Cir. 1969) 433 F.2d 928).

The deicision in *Bradley*, supra, held that "courts presume prejudice and exclude evidence of other crimes unless that evidence can be admitted for some substantial, legitimate purpose". In *People v. Stannard*, 32 N.Y.2d 143, the New York Court of Appeals reversed a conviction because the trial judge had admitted into evidence an inordinate amount of background material concerning the precinct in which the defendant was an officer, which

established crimes in which he did not participate. The New York Court held: "Every precaution must be taken lest it spill over its barriers and distort the jury's determination of the determinative and critical evidence". Said decision also acknowledged the admonitions of this Court that the instructions of the trial judge are insufficient to ward off the danger; and that truly prejudicial evidence cannot be erased from the juror's mind by instructions *(Blumenthal v. United States*, 332 U.S. 539, 559; *Bruton v. United States*, 391 U.S. 123).

CONCLUSION

Petitioner respectfully prays that this Court should review the determination of the Court of Appeals by granting a writ of certiorari.

Respectfully Submitted,

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APPENDIX A

ORDER OF AFFIRMANCE

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of August, one thousand nine hundred and seventy-three.

Present:

HON. WILLIAM H. MULLIGAN

HON. JAMES L. OAKES,

HON. WILLIAM H. TIMBERS,

Circuit Judges,

United States of America,

Plaintiff-Appellee,

v.

Edgardo Torralvo,

Defendant-Appellant.

Juan Jose Contreras,

Defendant.

Order of Affirmance

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

By: VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX B

ORDER DENYING REHEARING OF APPEAL

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

As a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of August, one thousand nine hundred and seventy-three.

Present:

HON WILLIAM H. MULLIGAN,

HON. JAMES L. OAKES,

HON. WILLIAM H. TIMBERS,

Circuit Judges

United States of America,

Plaintiff-Appellee

-v-

Edgardo Torralvo,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO,
Clerk